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No. 08-853

IN THE

# Supreme Court of the United States

BRUCE ZESSAR,

*Petitioner,*

*v.*

JOHN R. KEITH, *ET AL.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

## REPLY BRIEF

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## QUESTION PRESENTED

Respondents misstate Petitioner's Question Presented.

Petitioner does not seek review of the preliminary injunction standard at all. Petitioner merely seeks certiorari to resolve the circuit split that exists among Circuit Courts of Appeals interpreting *Buckhannon Bd. and Care Home Inc. v. W. Va. Dept. of Health*, 532 U.S. 598 (2001) as to whether "prevailing party" status is achieved by a merits-based victory followed by Defendants' mooting the claim or the district court must formally enter a final judgment.

Petitioner Bruce Zessar ("Petitioner or Plaintiff") respectfully submits this reply in support of his petition for a writ of certiorari.

Respondents' opposition ignores the only issue. Currently, among the several Circuits, there are two standards for determining prevailing party status, and thus, an award of attorneys' fees: 1) the Fourth, Seventh and Eighth Circuits require a final judgment or equivalent before awarding attorneys' fees; and 2) the majority of other Circuits only require a determination on the merits in awarding attorneys' fees, especially where, like here, the defendant loses on the merits of a claim but ultimately capitulates to the plaintiff.

Nonetheless, Respondents proffer three inapposite arguments to dispute the circuit split.

## REASONS FOR GRANTING THE PETITION

### I. The Seventh Circuit's Standard Is Inconsistent With § 1988's Intent Requiring a Final Judgment, Which Frustrates Citizens' Ability to Obtain Counsel, Who will be Unwilling to Assume the Time and Costs of Such Litigation and Encourages Government Actors to Prolong Any Litigation Knowing They Can Thwart an Attorneys' Fee Award by Mooting the Case At Any Time Before the Formal Entry of Final Judgment

First, Respondents mischaracterize the language and impact of the Seventh Circuit's opinion in this case in an effort to minimize the circuit split, which creates a standard that requires a final judgment for a party to achieve prevailing party status.

Respondents conveniently ignore the Seventh Circuit's mandate that a formal final judgment is required for prevailing party status: "Normally, such a determination will require a final judgment on the merits or a consent decree," App. A, p. 19a, and that "a final judgment on the merits is the normative judicial act that creates a prevailing party" (citing *Sole v. Wyner*, 127 S.Ct. 2188 (2007).[1] App. at 16a. The Seventh Circuit's holding is in direct contrast to the cases Petitioner cites from the First, Second, Third, Fifth, Sixth, Ninth, Eleventh, and D.C. Circuits, where even a preliminary merits determination is sufficient to achieve prevailing party status. The crux of this case is whether obtaining summary judgment, as Petitioner undisputably achieved here, is a sufficient, merits-based change.

Further, the Seventh Circuit's standard thwarts § 1988's intent to encourage lawyers to assume the risk of costs and fees, such as the substantial outlays Petitioner's attorneys made here, in order to prosecute meritorious constitutional violations.

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[1] Notably, the Seventh Circuit's reliance on *Sole* was based on the fact that the *Sole* court "declin[ed] to bestow prevailing party status on a plaintiff whose motion for preliminary injunction was granted but who failed to prevail on the merits." App. A at 16a. Petitioner does not dispute that *Sole* stands for the cited position, but the rationale simply does not apply here.

## II. The "Judicial Determination on the Merits" Requirement vs. The "Final Judgment" Requirement Are the Competing Standards that Petitioner Asks this Court to Resolve

Second, Respondents mischaracterize Petitioner's position, arguing that the plaintiffs in *People Against Violence v. City of Pittsburgh*, 520 F.3d 226 (3d Cir. 2008), *Dearmore v. City of Garland*, 519 F.3d 517 (5th Cir. 2008), *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939 (D.C. Cir. 2005), and *Watson v. County of Riverside*, 300 F.3d 1092 (9th Cir. 2002) obtained a decision that required Defendants to change its/their conduct (Opp. at 8-10). That narrow issue is irrelevant to this petition. The relevant point to address is whether a merits-based determination prior to the Defendants' mooting suffices for prevailing party status, even where that merits-based determination is prior to formal entry of final judgment.

Here, the merits-based determination was based on a complete record, granting the specific relief that Petitioner sought to obtain, i.e., a declaration that the Illinois absentee ballot procedures were unconstitutional. The import of this decision was shown by the fact that when the district court entered summary judgment on Petitioner's behalf, Illinois' absentee ballot procedures were no longer effective because they were declared unconstitutional.

Respondents' argument that the relief obtained does not entitle Petitioner prevailing party status is wrong because 1) the district court's summary judgment entry declaring the challenged absentee balloting provisions were unconstitutional was the relief sought which Respondents vigorously opposed until *after* they

lost on summary judgment; and 2) the dispositive factor in determining prevailing party status is the district court's "judgment on the merits" which is not limited to the specific type of relief obtained.

Defendants' capitulating after Petitioner's judgment on the merits, does not, as a majority of circuits have held, negate Petitioner's entitlement to attorneys' fees.

## III. The Effect of the Illinois Legislature's Mooting the Case Has No Bearing on this Petition

Third, Respondent disingeniously argues that the Illinois legislature's amending actions were done *sua sponte* despite the legislature's explicitly declaring that it "arose from this litigation." Pet. at p. 8, fn 4. And, the fact that the Illinois legislature was not a party to the litigation is irrelevant to this petition, which merely asks for review of the circuit split. As footnote 4 of the petition explains, this case was the reason that Illinois' absentee balloting procedures were changed.

## CONCLUSION

Among the several circuits, this Court's decision in *Buckhannon Bd. and Care Home Inc. v. W. Va. Dept. of Health*, 532 U.S. 598 (2001) is interpreted divergently. Petitioner asks that this Court hear the case to resolve the several circuits' differing interpretations of this Court's *Buckhannon* decision.

Respectfully submitted,

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